

Munford, Inc., World Bazaar Division and Anita Marie Wagnier. Case 7-CA-19298

1 August 1983

DECISION AND ORDER

**BY MEMBERS JENKINS, ZIMMERMAN, AND
HUNTER**

On 13 August 1982 Administrative Law Judge Richard H. Beddow, Jr., issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We reverse the Administrative Law Judge's finding that employees Wagnier, Nowak, and Bausano were constructively discharged for engaging in protected concerted activities in violation of Section 8(a)(1) of the Act. For the reasons stated below, we find that the Respondent's decision to discharge the employees was lawfully motivated by legitimate business interests.

The Respondent operates a chain of retail stores including the Lakeside Mall store in question. On 21 April 1981² the Respondent ordered all employees to take polygraph examinations due to a \$50,000 inventory shortage. The three above-named employees objected to being tested, and so informed the Respondent both before and after the tests were administered on 23 April. After the tests were given, District Store Manager Toth told each of these employees she had nothing to worry about.

On 29 April the employees learned that Store Manager Kozlowsky was being transferred to another store. Employee Wagnier asked Toth why Kozlowsky could not stay and was told that Lascola had been promoted to be the new manager and that it could not be changed. Wagnier then expressed a concern over maintaining her present work hours because of family obligations. Lascola, who had been in the store only 2 hours at the time, stated that he did not foresee a problem. Nowak and Bausano also expressed concern over possible changes in store procedures and were told by Toth

and Lascola that they were trying to determine the situation within the store and at the moment no changes were going to be made.

The following morning, 30 April, employees Wagnier, Nowak, and Bausano again protested the transfer of Kozlowsky. Wagnier, who was the principal spokesperson, asked Lascola to arrange for them to meet with the regional vice president, Modzelewski, in order to get answers to their questions. Lascola telephoned Toth and told him that he had an angry group of employees who were threatening to walk out if they did not get some answers about Kozlowsky's transfer. Toth relayed this message to Modzelewski, who called and spoke with Wagnier that afternoon. Modzelewski told Wagnier that she would be expected to work the same hours and number of nights as other assistant managers, that the former manager had been running a country club, and that the employees now should do as they were told or walk. Modzelewski also told her to tell the other employees and to give a decision by the end of that day whether she intended to continue working for the Respondent. After her conversation with Modzelewski ended, Toth told Wagnier that he did not understand Modzelewski's statements about Wagnier's hours but indicated that it might be in her best interest to resign. Lascola also was unable to tell Wagnier what hours she was expected to work. At no time did Wagnier provide an answer as requested by Modzelewski. Later that afternoon Lascola asked Wagnier for her keys to the store. She gave him the keys and left assuming that she had been discharged.

After Nowak observed Wagnier leave, Lascola questioned Nowak concerning her continued employment with the store and gave her until the next morning to indicate what she intended to do. The next morning, Nowak told Lascola that she felt Toth had lied to her and she had doubts about what was going on. She also questioned Lascola regarding her future work schedule. He stated that he needed an employee who could be at the store at any time, could be flexible, and that he could not give her a firm schedule. Nowak offered to try to work it out for 2 weeks but Lascola noted Nowak's expressed doubts, stated that he did not see any future in the store for her, and suggested that she resign. He then told Nowak that she could not work for him and requested her keys. She gave him the keys and left the store.

Bausano was not scheduled to work on 30 April but reported to work on 1 May. During a conversation with Lascola, Bausano, who had been a part-time employee, inquired about her work schedule. Lascola told her that she would have to work

¹ The Administrative Law Judge stated that employee Bausano worked "mornings only" whereas the record indicates that she regularly worked Saturdays from 12 noon to 9 p.m. twice a month, weekdays from 9:30 to about 1 p.m. except Tuesday, when she worked from 5 to 9 p.m.

² Unless otherwise indicated, all dates are 1981.

more than 20 hours a week, that he did not know how many more hours but that she would have to be flexible. After he would not give her a definite schedule, she indicated that she had no choice but to quit and he agreed. Bausano offered to work 2 more weeks but Lascola stated that it was not necessary and that she did not even have to complete that day. Thereafter, she left the store.

The Administrative Law Judge found that the employees' protests regarding polygraph examinations, the transfer of their former store manager, and their work schedules were protected under the National Labor Relations Act, and that they were constructively discharged in violation of Section 8(a)(1). Relying on *Wright Line*, 251 NLRB 1083 (1980), the Administrative Law Judge found that the employees' protected concerted protests were motivating factors in their discharge and that the Respondent's assertion that it needed to get a timely decision of the employees' future work plans was pretextual. He reasoned that the Respondent deliberately gave the employees the impression that they would be subjected to constantly changing work schedules in an effort to induce them to quit. Further, the Administrative Law Judge concluded that the employees were forced to make an immediate decision and in certain instances were discouraged from trying to work things out.

The Respondent excepts to the Administrative Law Judge's finding that the employees were constructively discharged for engaging in protected concerted activity in violation of Section 8(a)(1). To the contrary, the Respondent contends that its response to the alleged protected concerted activity was motivated solely by a desire to protect its legitimate business interest in remedying managerial deficiencies and inventory shortages.

We find merit in the Respondent's exceptions. The record shows that the Respondent had a legitimate need to reorganize its store operations. The former store manager previously had allowed the employees in question to work lenient weekend and night hours, due to personal and family obligations, a situation which was contrary to the Respondent's policy of requiring employees to work a more flexible and demanding³ schedule. As a result of the former manager's nonconformance with this policy, impacting particularly on busy night and weekend hours, the store incurred a \$50,000 inventory shortage. In light of the store's managerial and inventory problems, a polygraph examination was given employees, a new manager was appointed, and additional management trainees were tempo-

³ Employee Wagnier, who was the assistant store manager, worked only one week night, whereas assistant store managers in the Respondent's other stores worked two nights a week. The record also shows that both Nowak and Bausano regularly worked only one night a week.

rarily assigned to the store to assist the new manager. On the first day Manager Lascola was at the store, he told employees he wanted to determine the situation in the store, and that no scheduling changes would be imposed at that time. At no time did the Respondent indicate an intent to impose constantly changing work schedules as found by the Administrative Law Judge. However, in conformity with the Respondent's general policy, he and Regional Vice President Modzelewski found it necessary to get assurances from the employees during this transitional period that they would be willing to work more flexible work schedules. The business necessity for obtaining these assurances was particularly acute because the employees' repeated complaints caused the Respondent to fear that some of the employees would leave. In this regard, we find that the Respondent was motivated by a legitimate business interest in requesting that the employees agree to work a flexible schedule and in discharging the employees for refusing to make such an agreement.⁴ The employees' earlier complaints about the polygraph examination were not a factor in their discharges because they had been told they had nothing to worry about. Consequently, we reverse the Administrative Law Judge's finding that the employees were constructively discharged for engaging in protected concerted activity in violation of Section 8(a)(1). Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

⁴ In view of this finding we find it unnecessary to pass on the Administrative Law Judge's finding that the employees were engaged in protected concerted activity.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge: This matter was heard in Detroit, Michigan, on May 17 and 18, 1982. The proceeding is based on charges filed May 13, 1981, as amended June 24, 1981, by Anita Marie Wagnier, an individual. The General Counsel's complaint alleges that Munford, Inc., World Bazaar Division of Atlanta, Georgia, violated Section 8(a)(1) of the National Labor Relations Act by causing the termination of certain employees because they engaged in protected concerted activities by complaining about conditions of employment.

At the close of the hearing the General Counsel elected to present oral argument. Subsequently, a brief was filed by Respondent. Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent operates a number of retail gift and grocery stores and has gross annual revenues exceeding \$500,000. It maintains a store in Sterling Heights, Michigan, and annually receives goods valued in excess of \$50,000 from suppliers outside Michigan. It admits that at all times material herein it is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

World Bazaar's operations include a home furnishing shop at Lakeside Mall in Sterling Heights. During April 1981, Michael Kozlowsky was the store manager at Lakeside Mall, Gary Toth was Respondent's district manager and supervisor of 9 area stores, and Paul Modzelewski was Respondent's regional vice president of operations with overall responsibility for 6 regions and 65 stores. On April 29, 1981, Chuck Lascola replaced Kozlowsky as manager at the Lakeside Mall store. During April 1981, Anita Wargnier, Phyllis Bausano, and Carol Nowak were three of approximately seven employees at that store.

Wargnier was hired by Kozlowsky in October 1980 as a cashier and in early February 1981 was given the title of assistant manager. She then handled cash reports, checked merchandise records, had a key to open and close the store, and assigned work to employees from a list prepared by Kozlowsky. She did not have authority to hire or fire, but spoke to employees about their work performance when requested to do so by Kozlowsky. She also listed weekly employees' work schedules which were basically preestablished, except for rotating assignments on weekends. She submitted the schedule to Kozlowsky for approval and, occasionally, he would make changes. As assistant manager she earned \$4 an hour. Previously, she received \$3.35 an hour although some other employees earned \$3.50 hourly. She continued to operate the cash register and to do stockwork with the principal differences as assistant manager being that she did paperwork and worked more hours.

Respondent's general practice is to have store managers select assistant managers from employees that stand out above others. Concurrence by the district manager is normally obtained. Assistant managers are expected to be responsible for the store when the manager is not there and this same responsibility is given to so-called "third keys" who also open or close, etc., when neither the manager nor assistant manager is on duty.

Wargnier generally worked from 9:30 a.m. to 5 p.m. during the week except for Tuesdays, when she worked from 5 to 9 p.m., and on Saturdays when her hours were 9:30 a.m. to 6 p.m. When asked, she occasionally would work on Sundays. Nowak, who is Wargnier's sister, and

Bausano also started at World Bazaar in October 1980 as cashiers and stockpersons. Nowak's daughter also worked at the store. Nowak normally worked Mondays from 12 noon to 9 p.m. and other weekdays from 9:30 a.m. to 1:30 p.m. Occasionally she worked on weekends. Bausano worked mornings only, 5 days a week, but did work weekends during the Christmas season.

On Tuesday, April 21, 1981, the three above-named employees were notified by Kozlowsky that Toth had scheduled polygraph testing because of an excessive inventory shortage. All three objected. The next morning, after discussing it with their husbands, Wargnier and Bausano renewed their objections. Kozlowsky called Toth and advised him of the employees' objections. Kozlowsky then told them that Toth had said the tests were ordered and he wanted the employees to take them. After receiving reassurances by the test administrator, all three took the test along with the other employees.

Several days later, on Monday, April 27, 1981, Toth was at the Lakeside Mall store and approached Wargnier and Bausano. Both took the opportunity to express how upset they were about the testing. He reassured them, indicated that the testing was a condition of employment, and said they had been cleared. Although the employment application form contains a clause whereby the applicant agrees to submit to polygraph testing, this was not brought to the employees' attention either before or after the testing of April 23, 1981.

On Wednesday, April 29, 1981, Wargnier and Bausano were at lunch when they were approached by Kozlowsky and another man, Lascola. Kozlowsky told them he would no longer be their manager, that he had the choice to quit, be fired, or transfer, and had to make that decision by Friday noon. Bausano asked what was happening and Kozlowsky said he could not talk at that time but would get back with them later. Toth was in the store when Wargnier returned. She told him she was upset and did not know what was happening in the store and began crying. Toth had her sit down and then told her that Kozlowsky had asked for a transfer in a letter to Modzelewski but now had doubts. She asked why Kozlowsky could not just stay and was told that Lascola had already been promoted to be the new manager and it could not be changed.

Wargnier then expressed a concern over her scheduled work hours in connection with the practices of a new manager and because of her family obligations. Toth asked her present schedule and, as she told him, Lascola came in. When asked by Toth, Lascola said he did not foresee a problem.

Toth then had similar conversations with other employees then at the store, including Bausano and Nowak, and he introduced them to Lascola. Nowak and Bausano expressed concern over possible changes in procedures and Toth and Lascola indicated "at the moment we were not going to make any changes" and that "we were going to try to determine the situation within the store prior to making any type of change at all."

The evening of April 29 Wargnier called Kozlowsky and asked about his requested transfer. Kozlowsky indicated his letter had dealt with comparison of the Lake-

side Mall store with a smaller store and denied asking for a transfer. She at that time remembered having read the letter when Kozlowsky prepared it.¹ She then called Nowak and discussed her conversation about the transfer. Nowak also had read the letter and did not remember any mention of a requested transfer. They agreed that all the employees should get together the next day and find out just what was going on.

On Thursday morning, April 30, 1981, five employees, including Wagnier, Nowak, and Bausano, approached Lascola. Wagnier was the principal spokesperson and Lascola was asked to arrange for them to meet with Modzelewski in order to get answers to their questions and to clear up their doubts. Lascola agreed to call through channels and phoned Toth. He told Toth that he had an angry group of employees who were threatening to walk out if they did not get some answers about Kozlowsky's transfer. Lascola could not recall if any actual comments were made by the employees regarding a walkout, but he believed this was their insinuation and he felt there was an underlying threat that they would have if their demands were not met. Toth was told that Wagnier was acting as spokesperson and she then got on the phone. Toth told her essentially what he had discussed with her the day before. Wagnier asked whose decision it was and was told it was management's. She asked to speak with upper management and Toth then called Regional Vice President Modzelewski. Toth admitted that during the conversation no walkout threat was made to him by Wagnier. Modzelewski testified that on April 30, 1981, he was called by Toth and informed that there was a problem at the Sterling Heights store, that the employees were unhappy about Kozlowsky's transfer, and that they wanted to talk to Modzelewski in person. He allegedly also was told they were very upset and were threatening to walk off the job; however, Toth did not recall the exact way the conversation went. Modzelewski then talked with Lascola who reiterated what was said by Toth. Assertedly, Lascola also said he was uncertain whether the employees would stay (apparently if they did not get to speak with Modzelewski). Lascola indicated that Wagnier was spokesman for the group and Modzelewski agreed to talk to her. Both Toth and Lascola had indicated to Modzelewski that there was some question regarding her hours.

On cross-examination Modzelewski recalled that he had been made aware of employee complaints about the polygraph testing prior to his conversations of April 30, 1981. He also admitted that prior to April 30, 1981, he had questioned Wagnier's hours, apparently as they related to the problem of shrinkage at the store and concern over nights when neither the manager nor assistant manager was on duty. It also was established that payroll

records for all employees were routed through Atlanta and that they would reflect the hours worked.

Early that afternoon Modzelewski called and spoke with Wagnier. She testified that she affirmed his understanding that the employees were upset about Kozlowsky's transfer but she denied that they were threatening to walk out, explaining that one employee had said she felt it was hard to work in this situation. Wagnier further testified that Modzelewski stated, "you as assistant manager have relatives working under you, you are not pulling your hours, not working nights or Sundays." She replied that Lascola and Toth had okayed her hours the day before. She testified that Modzelewski replied that Kozlowsky was running a country club and that they should do what they are told, or walk, that she should tell the other employees, and that she should give a decision by the end of the day. Wagnier assumed the decision was about the hours she was supposed to pull.

Modzelewski testified that Wagnier had two questions, why Kozlowsky was transferred and about her hours. He agreed that she was told the transfer was "none of her damn business" and also that he was aware of some problem with her hours and that she would be expected to work the same hours and number of nights as the average assistant manager, in effect, that she would have to work two nights a week.

He testified that Wagnier said at that rate she would be forced to decide between World Bazaar and her family, but he denied that he said she could take a walk if she did not like the hours assigned to her. Modzelewski also testified that he told her he wanted an answer within an hour as to whether the employees were going to stay or leave and that she should tell the others exactly what they talked about.

When Wagnier got off the phone with Modzelewski she told Lascola she did not understand Modzelewski's statements about her hours and that she wanted to talk with Toth. Toth was called but said he also did not understand. He declined to give her any specific answer as to her expected work hours but said he would get back to her. He also questioned whether or not it might be in her best interest to resign.

She began crying and asking Lascola what hours she was expected to work and he kept replying he did not know what to tell her. Between 1 and 2 p.m., she went to the front of the store where Nowak suggested she get a cup of coffee and calm down. When she returned, Lascola met her at the first aisle and asked her for her keys to the store.² She gave him the keys, got her coat, and left the store inasmuch as she assumed she had been terminated.

Nowak had listened as her sister talked with Modzelewski. She then ran the cash register until 2 p.m., and asked if she could go home as it was past her normal departure time. Lascola said yes and as she was going to

¹ The letter itself is handwritten on just over six sides of Munford, Inc., memo paper addressed to Modzelewski and signed by Kozlowsky. It is a somewhat rambling expression of Kozlowsky's feelings about running a larger store than he had before, with an emphasis on the store's problem with shrinkage, his self-doubts, and his pride in some accomplishments. Prior to a postscript, Kozlowsky wrote: "If you ever find it necessary to place someone more qualified up here, I certainly would not take it as a disappointment." He then thanked Modzelewski "for listening."

² Lascola testified that Wagnier was asked for her keys near the stockroom after saying, "I've got no choice"—"I guess I have to leave" and proceeded to get her coat and purse. Nowak testified that Wagnier had her purse with her as she returned from coffee and did not have her coat. I therefore credit Wagnier's testimony that she was asked for her keys before getting her coat.

get her coat she observed her sister return and Lascola ask her for her keys. She heard her sister cry and say "my whole world is crumbling. I love my job." After Nowak got her coat and began to leave Lascola approached and asked her what she intended to do. She asked for time until the evening or next morning but he urged her to tell him by that evening.

Lascola agreed that he told Nowak that he needed to know which employees were leaving. Nowak called Lascola at 8:30 p.m., but asked to talk to him about things concerning the decision the next morning. A conversation was held the next morning and Nowak questioned the hours she would be scheduled for work and said she felt she had been lied to by Toth and she expressed her doubts about what was going on, about the treatment of her sister, and about what changes would be made at the store. Lascola said he needed an employee that could be at the store at any time, could be flexible, and could put in all the hours needed, but he did not know and could not give her a firm schedule. Nowak suggested that they should give it a chance for 2 weeks to work things out but Lascola noted some doubts that had been expressed or implied and said he did not see any future in the store for her.³ She said she had no choice but to give her 2 weeks' notice. Lascola responded by suggesting it would be best if she quit then and there and that she could write out her resignation. As Lascola observed, Kozlowski entered, asked what Nowak was doing, and then asked whether she wanted to quit. She said no. Kozlowski said not to do it and she tore up the resignation and threw it away. Lascola told her she could not work for him and asked for her keys. She turned them over and left the store shortly before noon.

Bausano was not scheduled to work on April 30 but did come in on May 1, 1981, prior to her scheduled starting time at 12 noon. She had received a message the previous night that Lascola wanted to see her. Upon her arrival he suggested they go for coffee. She asked how the recent events affected her and Lascola told her that her schedule would be changed and that she would have to put in more than 20 hours a week. In response to her question he replied that he did not know how many hours more but that she would have to be flexible. Previously, Kozlowski had indicated that summer hours would be reduced and she had arranged to work between 16 and 18 hours a week for that period. Lascola said he could not agree to these summer hours. She explained her considerations and he said he could not do anything about them and that she had to be flexible. She attempted to pinpoint definite hours but Lascola evaded any answer. She then said, "I guess I have no choice but to quit" and Lascola said, "I guess not." She offered to work for 2 more weeks but Lascola said he felt it was not necessary. He told her that she did not have to complete that day and she went home.

Toth testified that he was extremely pleased with the work performances of Wagnier, Nowak, and Bausano, rated them as very good employees, and never told Lascola to fire them. He also noted that after Kozlowski's

letter of March 17, 1981, which allegedly requested a transfer, Kozlowski received a memo from both Toth and Modzelewski expressing pleasure with the store's improved performance.

Prior to the confrontation of April 30, Toth made a decision to place at least three company employees from other locations on temporary assignment to the Lakeside Mall store. Two were store managers and one was a management trainee. The trainee was intended to remain for a while as an assistant and to help straighten up the store. The trainee arrived the night of April 30, 1981, prior to the departures of Nowak and would have been placed there as extra help whether or not Toth had a full complement of employees.

Several days after May 1, 1981, former Manager Kozlowski called Modzelewski to request money for moving expenses to the area that he had accepted transfer. Modzelewski said he wanted to talk about what was happening in Michigan and asked if Kozlowski was organizing a union. Modzelewski said he had received the NLRB complaint filed by Wagnier. They then discussed the reasons for the complaint and what Kozlowski's part in it was, and then Modzelewski made an accusation that Kozlowski was creating a union. Kozlowski denied the accusation and the conversation ended. Before Kozlowski testified, Modzelewski denied that he had any concern that the employees might seek union representation or that he communicated this concern to anyone. No attempt was made to rebut Kozlowski's testimony in this regard and I find it to be credible.

III. DISCUSSION

The issues in this proceeding are whether Anita Wagnier was employed as a supervisor within the meaning of the Act and thereby excluded from coverage; whether the involved employees voluntarily quit or were constructively fired; and whether these employees were engaged in a protected concerted activity such that their discharges would warrant a finding that it constituted an unfair labor practice.

A. Supervisory Status

Inasmuch as Respondent raised Wagnier's purported supervisory status as a defense of her alleged discharge, the burden of proof rests on Respondent to establish that status. See *Thayer Dairy Co.*, 233 NLRB 1383 (1977).

Section 2(11) of the Act defines a supervisor as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The existence of any one element can be sufficient to convey supervisory status; however, sporadic or occasional exercise of supervisory authority is insufficient to

³ Lascola testified that he did not reject Nowak's suggestion and did not say he did not see any future in the store for her; however, I consider his responses here to be equivocal and I credit Nowak's testimony.

make an employee a supervisor. Also, investiture with a title and theoretical power which may imply supervisory authority likewise is insufficient to transform a rank-and-file employee into a supervisor. See the *Thayer* case, *supra*, and *Teamsters Local 574*, 259 NLRB 344 (1981), and cases cited therein. Moreover, it is important that authority is actually exercised with the use of independent judgment and that the supervisor be something more than a conduit for managerial directives, see *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

Here, the record shows that Wagnier neither held nor exercised any significant supervisory authority except for the direction of other employees during the manager's absence. Even this was of a routine nature, without real independent judgment, and it amounted to no more than coordination of the work in the store in accordance with management's wishes. The title and position were little different from that of a "third key" employee, it was a local store selection, and it did not place her on a "track" for advancement to a management's position within the Company. Wagnier remained an hourly employee and continued to perform the routine tasks she previously had performed and, accordingly, it is concluded that Respondent has not shown that Wagnier was a supervisor within the meaning of Section 2(11) of the Act at the time of her separation from employment.

B. Constructive Termination

During April 1981, the employees of Respondent's Lakeside Mall store experienced a series of threatening events in what previously had been a pleasant and harmonious working environment. Their initial concern over polygraph testing was followed by the abrupt transfer of their store manager and followed by the interjection of questions related to their future work hours and scheduling. Their questions were met with evasive answers by both new Store Manager Lascola and District Manager Toth.

Viewed in isolation, the expressed doubts of a new manager about the precise work schedule of his employees might not be sufficient to create a major concern in the minds of the employees. However, the entire chain of events which cumulated with Respondent's top-level management, Modzelewski, taking an apparent hard line approach, was followed by a replay of nonanswers by Lascola and Toth regarding the employees' hours and schedules.

The phone comment of Vice President Modzelewski to Wagnier on April 30, 1981, to the effect that she would be expected to work the hours required of her was interpreted by her as a threat to require additional weekend and night work. Nothing was said or done by Respondent to dispell this perception. To the contrary, the reaction by Modzelewski was to raise other issues and to say that the former manager was running a country club and the employees should do as they were told or walk. Wagnier then was told to tell the other employees *and* to give a decision by the end of that day. District Manager Toth asked her if it would not be in her best interest to resign. Lascola's reaction to an obviously distraught Wagnier was to say he did not know what to tell her. In fact, Lascola expressed doubts sepa-

ately to each employee that suitable work schedules could be worked out and then asked each of them to reach a decision as to his or her plans that same day. Lascola indicated that he told Wagnier that she had an hour to decide whether she was going to stay with World Bazaar or leave.

Against this background, I conclude that the employees were unexpectedly given the alternative of either accepting working conditions where their hours and schedule would be susceptible to intimidating and unilateral changes on the part of management, or of leaving their employment and I find that this supports a conclusion that they were constructively discharged.

Moreover, it is apparent that Modzelewski, Toth, and Lascola were each aware to one degree or another that changes in fact were being planned for at least some of the stores' employees. Most specifically, even before Wagnier had spoken with Modzelewski on April 30, 1981, plans had been made to bring a management trainee to the store as an assistant and it appears that Wagnier had intuitive cause to be concerned over her future schedule and working conditions.

Even as Lascola and Toth were evading answers about the employees' hours and schedules and pressing them for a decision on whether or not they would stay with the store, they were aware that arrangements already had been made for standby personnel to cover the store that day and for the weekend, if these employees left.

Under these circumstances, I infer that Respondent deliberately implied to the employees that they would be faced with unsettled and changing work hours and schedules in an effort calculated to induce them to quit. The employees were not offered other options to consider but were pressed to make an almost immediate decision and even were discouraged from taking 2 weeks to try to work something out. I conclude that Respondent engaged in a calculated effort to force Wagnier, Nowak, and Bausano to leave and I conclude that in each instance it must be considered that they had no free choice in the matter and that it resulted in their constructive discharge.

C. Nature of the Employees' Activity and Termination

The employees' concerted protest relating to the taking of polygraph examinations and the transfer of the store manager are not of such a nature that they automatically would be included within the protection of the Act; however, here they are combined with concerted complaints regarding their scheduling and hours of service, which activity clearly is protected, and these initial protests provide the background against which Respondent's motivation must be judged. Moreover, I find that the employees' protest over the manager's transfer in this instance is shown to have a direct impact on the employees' own job interests (especially their work hours), and therefore is a protected activity, see *Henning and Cheadle, Inc.*, 212 NLRB 776 (1974). Based on these factors, I infer that the employees' protected concerted protests were a motivating factor in their discharge, and in keeping with the criteria set forth in *Wright Line*, 251 NLRB

1083 (1980), and *Castle Instant Maintenance/Maid*, 256 NLRB 130 (1981), the record must be evaluated to see if Respondent has demonstrated that it would have terminated these employees even in the absence of their protected conduct.

Respondent's defenses that the employees voluntarily quit and that they were not engaged in a protected activity have been discussed above. Respondent otherwise asserts that its response to the employees' activities was not in retribution to the protest of the alleged discriminatees but was motivated solely by a desire to protect its legitimate business interests, i.e., to counter "shrinkage" at the Sterling Heights store by improving supervision, especially at night, and to insure it had sufficient employees for the busy weekend sales period.

The record, however, fails to support Respondent's assertions. To the contrary, I find that Respondent's management had decided to make changes at the Lakeside Mall store prior to the protests of the employees. Respondent then became annoyed with Wagnier, Nowak, and Bausano when they persisted in their protest and questions regarding the former manager's transfer and their future conditions of employment. I infer from Modzelewski's admission that he previously was aware of Wagnier's schedule of night work and Toth's admission that he had arranged to bring in a management trainee to help the new manager straighten up the store prior to the protests of April 29 and 30, 1981, that one or the other already had planned for the probable replacement of Wagnier as assistant manager. Wagnier's persistence in attempting to get some answers to the employees' questions presented Respondent with an opportunity not only to remove her from the assistant manager's slot but also to retaliate against her and to get rid of what had turned out to be an unexpected questioning of their managerial prerogatives.

Respondent already had arranged for other personnel to assist new Manager Lascola in "straightening up" the store and they had no serious need for all of the regular employees to remain on the schedule. In fact, it was to their advantage to avoid having to pay some of the employees who were already scheduled to work. Under these circumstances, I find that Respondent's assertion that it needed to get a timely decision about Nowak's and Bausano's future work plans because of concern over "weekend" coverage of the store to be completely pretextual. As noted, Respondent already had arranged other coverage and, secondly, Respondent specifically rejected the offer of both of these employees to work for at least another 2 weeks. As contended by the General Counsel, the real reason for the very short deadline for their decision was to prod or push the employees out the door. Moreover, the need for any decision at all appears to be a pretext created by management to assist it in an apparent attempt to rearrange personnel as part of its planned straightening up of the store. The selection of Wagnier, Nowak, and Bausano to be the victims of Respondent's plans occurred because they had come to management's attention through their protest over possi-

ble changes in working conditions. Otherwise, these employees were shown to have had good work records and no cause is shown for their termination, except for Respondent's alleged concern over their future availability as employees.

There is no indication that any employees other than Wagnier, Nowak, and Bausano were subjected to questions and deadlines concerning their continuation of employment at the store and, accordingly, I am not persuaded that Respondent has shown that the involved employees would have been subjected to the treatment and pressures which resulted in their constructive discharges were it not for the employees' protected activities in questioning the replacement of the former store manager and in questioning their future work hours and schedules.

Under these circumstances, I find that the General Counsel has met his overall burden of proof consistent with the criteria set forth in *Wright Line* and *Castle Instant Maintenance/Maid*, *supra*, and I conclude that Respondent's constructive discharge of Wagnier, Nowak, and Bausano violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Anita Marie Wagnier was at all times material herein an employee within the meaning of Section 2(3) of the Act and not a supervisor within the meaning of Section 2(11) of the Act.
3. By discharging Anita Marie Wagnier on April 30, 1981, and Phyllis L. Bausano and Josephine Carol Nowak on May 1, 1981, Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer Anita Marie Wagnier, Phyllis L. Bausano, and Josephine Carol Nowak immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges they previously enjoyed. It is also recommended that Respondent be ordered to make them whole for the losses which they suffered as a result of their termination in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed by the Board in *Florida Steel Corp.*, 231 NLRB 651 (1977). See also *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]